WRONGFUL DISMISSAL AND OTHER EMPLOYMENT ISSUES IN THE PUBLIC SERVICE

Ministry of Attorney General
Legal Services Branch
March 1991

91-04042/

WRONGFUL DISMISSAL AND OTHER EMPLOYMENT ISSUES IN THE PUBLIC SERVICE

Introduction

This booklet provides an outline of employment principles applicable to non-union or "excluded" employees in the public service. It also details recent developments in employment-related issues arising under provincial human rights legislation.

It is not intended to be a comprehensive statement of the law, but rather seeks to provide a framework for recognizing legal issues that may arise in the employment relationship. Specific problems or questions should be directed to ministry solicitors.

The "law of wrongful dismissal": what is it?

The law of wrongful dismissal is that body of legal principles developed by the courts to deal with cases where an employee has been dismissed from employment and there is some question about whether the employer had legal justification or "just cause" for dismissal. This area of the law also encompasses situations where an employee's terms and conditions of employment have been unilaterally changed by the employer to such degree it can be said the employee has been "constructively dismissed".

An employer can dismiss an excluded or non-union employee at any time either with or without just cause. However, the law requires that where there is no "just cause" to dismiss, the employer must either provide the employee with adequate notice of termination, or compensation in lieu of that notice. The law of wrongful dismissal deals primarily with such issues as: what constitutes "just cause"; what is the appropriate notice period; and what is the appropriate compensation ("damages").

Many statutes affect public service employment. Wrongful dismissal principles and related employment issues must be assessed having regard to these statutes. (See Appendix A for summary of legislation.)

Who does the law of wrongful dismissal apply to?

The law applies only to the employer-employee relationship, so the first question to be resolved is whether the individual claiming to have been wrongfully dismissed is an "employee".

Usually this question is easily answered, particularly if the person is appointed under the *Public Service Act* (in which case he or she is clearly an employee). However, if the person is performing a contract for services for the government (an "independent contractor") the law of wrongful dismissal will not apply. Doubt as to whether an individual is or is not an employee should be resolved by obtaining legal advice.

Even if a person is a public service employee, the law of wrongful dismissal will only apply if that employee is an "excluded" employee, that is, one who is not a member of a union.

The *Public Service Labour Relations Act* provides the framework for determining who is a union and who is a non-union or excluded employee. Under that Act, an employee is excluded in one of three ways:

(1) by exclusion in the definition of "employee" in s. 1 of the *Act*;

(2) by agreement between the union and the government (as represented by the Government Personnel Services Division); or

(3) by the Industrial Relations Council on application by the government under s. 12 of the *Act*.

The Council will exclude from the union those employees who perform line managerial or superintending functions, are in confidential planning or advisory positions in the development of government management policy, or are involved in a confidential capacity in matters relating to labour relations or personnel.

Excluded employees in the public service fall into four main categories: management employees (and most of the excluded employees fall into this category), salaried physicians, non-management excluded employees (often referred to as "Schedule A" employees), and "statutory term appointees" (employees employed for less than sixty days who are excluded under s. 1 (j) of the *Public Service Labour Relations Act*).

The terms and conditions of employment of excluded employees are set out in directives made under the *Public Service Act*.

Common law of wrongful dismissal versus dismissal under a collective agreement.

Discipline and dismissal of union employees are matters dealt with exclusively under the collective agreement, and the courts will not interfere with that process. Dismissal of non-union or excluded employees, on the other hand, is dealt with exclusively by the courts.

The law of discipline and dismissal which governs union employees (the law of the collective agreement) is different in some fundamental respects from the common law of wrongful dismissal. The major differences can be summarized as follows:

1. An arbitrator deciding whether or not the discipline or dismissal of a union employee is for "just cause" is given a number of powers under the *Industrial Relations Act*, including the power to substitute disciplinary measures for those imposed and the power of reinstatement.

   The courts, however, in deciding whether or not a non-union employee has been wrongfully dismissed, cannot reinstate that employee unless there are exceptional circumstances. All the court can do is award the wrongfully dismissed employee damages.

   If it can be established, however, that the dismissal of an excluded employee was not in accordance with the *Public Service Act*, or was procedurally unfair, the court has the discretion to find the dismissal to be void and make a declaration of continued employment.

2. The analysis used by arbitrators in discharge grievances is quite different from that employed by the courts in a wrongful dismissal action. In deciding whether a union employee should have been dismissed, the arbitrator will consider a number of mitigating factors respecting an employee's work record such as years of service, degree of remorse, etc.

   The court however, does not take these kinds of factors into account when deciding if there was just cause to dismiss. It will take some similar factors into account (age, years of service, position, availability of similar alternate employment) but only when assessing damages once it concludes that the employee was dismissed without just cause.

3. While the law of the collective agreement finds its roots in common law principles, it has, in part because of its unique statutory framework, developed differently than the common law of wrongful dismissal.

It is therefore often the case that the conduct of a union employee will not constitute just cause for dismissal in the eyes of an arbitrator, while that same conduct by a non-union employee will constitute just cause in the eyes of the court.

For example, the courts most often view employee dishonesty, such as theft or conflict of interest, as warranting summary discharge of that employee. On the other hand, an arbitrator, while he may conclude the dishonest conduct warrants some form of discipline, may not uphold a dismissal if the employee in question has an unblemished work record, has demonstrated a sufficient degree of remorse, or because similar factors have been established.

As the B.C. Labour Relations Board put it in the *William Scott* case, "The point is that the right to continued employment is normally a much firmer and more valuable legal claim under a collective agreement than under the common law individual contract of employment. As a result, discharge of an employee under collective bargaining law, especially one who has worked under it for some time under the agreement, is a qualitatively more serious and more detrimental event than it would be under the common law."

4. The doctrines of "culminating incident" and "progressive discipline", so much a part of the law of the collective agreement, are not recognized by the common law applicable to excluded employees.

   [The "culminating incident" doctrine outlines those circumstances in which it is proper for the employer to consider an employee's past employment record in disciplinary matters. Some final or culminating incident for which some discipline may properly be invoked must be established, and only on proof of that incident will the prior record of the employee become relevant in assessing the appropriateness of the penalty.

   The "progressive discipline" doctrine recognizes a duty in an employer to fully inform an employee of both a failure to conform to an acceptable standard of behaviour and the likely disciplinary sanctions that will be imposed should that behaviour exist. Discipline must be progressive.]

Who has the authority to dismiss a public service employee?

Section 15 of the *Public Service Act* provides that only a minister or deputy minister may dismiss an excluded employee.

Additionally, the minister, deputy minister, or an employee who has been specifically authorized by the minister or deputy minister, may suspend an employee if that employee:

(1) is guilty of misconduct, negligence or incompetence in the performance of his duties; or

(2) is charged with a criminal offence that would render him unsuitable to perform his duties.

(See section 15, *Public Service Act*.)

The dismissal process

There are some important legal issues that arise in the dismissal process.

Duty to act fairly

A minister or deputy minister exercising powers of dismissal is bound by a general duty to act fairly.

A minister, deputy minister or designate may be bound by such a duty when suspending an employee from employment.

The duty to act fairly ensures that the procedures used in terminating employment are fair to the employee — the employee must be given the opportunity to try to change the employer's mind.

The duty to act fairly requires two things:

(1) the employee must be provided with advance notice of reasons for the dismissal; and,

(2) the employee must have an opportunity to respond to those reasons.

In some cases the opportunity to respond or to be heard may require an oral hearing before the decision-maker. Questions as to the sufficiency of the notice and opportunity to be heard should be directed to your ministry solicitor.

NOTE: where a dismissed employee can establish he was dealt with in a manner that was procedurally unfair (such as improper or no notice of reasons; improper or no opportunity to be heard) a reviewing court has the discretion to declare the dismissal to be void.

Opportunity to resign

An employee may be given the opportunity to resign rather than be fired, but the employee should not be coerced into doing so. A forced resignation is viewed by the courts as an invalid resignation, so an employee who is forced to resign will not be precluded from subsequently suing the employer for wrongful dismissal.

What constitutes "just cause"?

In any dismissal case, the onus is on the employer to prove on a balance of probabilities that there was "just cause" for the dismissal. Just cause requires a demonstration of real misconduct or gross incompetence: there must be something more than mere dissatisfaction with an employee.

The courts have on numerous occasions declared that it is impossible to give an exhaustive definition of what will constitute just cause. As a general rule, if an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence, or conduct incompatible with assigned duties or prejudicial to the employer's business, or has been guilty of wilful disobedience of the employer's orders in a matter of substance, the law recognizes the employer's right to terminate employment without notice.

Conduct which may constitute just cause includes dishonesty (theft, lying to employer, fraud, etc.), conflict of interest, insolence, and wilful disobedience. One incident of misconduct or disobedience will justify dismissal if it can be characterized as a deliberate flouting of the essential contractual conditions.

The standards of conduct for public service employees, including standards respecting conflict of interest, duty of fidelity, confidentiality and public comment, are provided for in directives issued under s. 2 of the *Public Service Act*. (Personnel Management Policies and Procedures Directive, section 1.3.)

Some ministries have supplemented these standards with a written ministry policy.

In order to rely on a breach of these standards and/or policy as a ground for dismissal, at the very minimum it will have to be established that the employee was aware of, and had read and understood these standards and/or policy.

Public service employees are also required to either swear or affirm an oath of employment agreeing to truly and faithfully, according to the employee's skill, ability and knowledge, execute the duties, powers and trusts placed in him/her by the Crown. (*Public Service Act*, s. 13: Personnel Management Policies and Procedures Directive, s. 1.2.)

Public service employees are also bound by the common law duties of fidelity (or loyalty), good faith and confidentiality. These duties will be assessed in the particular context of public service employment and having regard to the concept of political neutrality or impartiality. By demanding allegiance and fidelity to the government of the day regardless of a public servant's personal political views, and by requiring the preservation of confidentiality for government information, these common law duties help to ensure the neutrality, impartiality and integrity of the public service.

Cases dealing with breaches of a public servant's common law duties of fidelity, good faith or confidentiality as a ground for dismissal most frequently arise in cases relating to critical comment on government policies and activities.

In 1985, the dismissal of a Revenue Canada employee for continued public criticism of the federal government's policy on metric conversion was upheld by the Supreme Court of Canada. The court held that while some speech by public servants is permissible, free speech is not an absolute, unqualified value. A job in the public service has two dimensions — one relating to the employee's tasks and his performance, the other to the perception held by the public. In that case, the criticisms were job-related because of the importance and necessity of an impartial public service. The public interest in both the actual and apparent impartiality of the public service dictated a general requirement of loyalty on the part of the public servant to the government as opposed to the political party in power.

As a general rule, work performance problems such as incompetence or excessive absenteeism are treated differently than cases of deliberate employee misconduct because such conduct is often not "wilful". In these kinds of cases the courts will, at minimum, require the employer to demonstrate the employee has been: advised of the standards expected of him; given a reasonable opportunity to meet those standards; and warned of the consequences of not complying with those standards. In cases of employee incompetence particularly, it is advisable to seek assistance early on in the disciplinary process.

Particular caution should be exercised where dismissal is contemplated because of prolonged or continued but sporadic illness. Such action may be challenged as discriminatory under the *Human Rights Act*. Similarly legal advice should be sought prior to the dismissal of an employee in receipt of STIIP or LTD benefits.

Circumstances which will never constitute just cause to dismiss include reorganizations resulting in redundancies or cut-backs resulting from economic problems.

The case for just cause can be jeopardized by the actions of ministry officials. For example, the provision of a reference letter praising an employee's work performance will probably negate the right to defend that employee's dismissal as being for cause. Similarly, the validity of a warning as forming the basis for a dismissal will be jeopardized where subsequently the employee's efforts to improve performance as a result of that warning are praised. Lastly, the offer of severance monies at the time of dismissal may well preclude an allegation of just cause. The law does not prohibit the payment of some money, but in order to preserve a claim for just cause, any payment in such circumstances should only be undertaken with prior legal advice.

Does it make any difference if the employee is a probationary employee?

The *Public Service Act* requires that persons appointed to a public service position in the first instance serve a 6 month probationary period. Public service employees appointed to a new position will also be required to serve a 6 month probationary period unless the deputy minister (or an employee authorized by him) waives all or part of that probationary period.

The courts have recognized a different or "lesser" standard of just cause in relation to the dismissal of probationary employees, but generally require at minimum that such employees be treated fairly and reasonably.

What is a "constructive dismissal"?

Constructive dismissal can occur where an employer unilaterally imposes changes to essential or fundamental terms of an employee's employment contract. Such action gives the employee the right, but not the obligation, to treat the employment contract as over. In other words, the employee can quit his employment and sue the employer for damages for constructive dismissal. As in the case of damages for wrongful dismissal, the damages an employee is entitled to are calculated on the basis of a reasonable notice period.

An employee may accept the change, in which case the employee effectively waives the right to sue for constructive dismissal. The employee is, however, entitled to a reasonable period within which to do so, and a "reasonable period" has been interpreted in one B.C. case as 4 months.

Recent cases indicate that the following employer actions may give rise to a constructive dismissal: a reduction in salary, a significant change in status, power or authority, and elimination of the position.

Examples:

Elimination of an employee's position as general counsel because of an internal reorganization and substitution of new position with significantly different responsibilities with no change in salary or benefits was held to constitute a constructive dismissal in *O'Grady* v. *I.C.B.C.* (1975) 63 D.L.R. (3d) 370 (B.C.S.C.);

A reorganization which resulted in an employee becoming the only department head required to report to the vice-president (whereas previously six had reported to the vice-president) who was an individual with whom the employee had had serious differences in the past, was held to constitute a constructive dismissal, even though the plaintiff suffered no decrease in salary or benefits: *Burton* v. *McMillan Bloedel Ltd.* [1976] 4 W.W.R. 267 (B.C.S.C.);

A reduction of salary and placement of an employee on probation was found to be a constructive dismissal in *Wallace* v. *Toronto Dominion Bank* (1981) 39 O.R. (2d) 350 (Ont. H. Ct.);

A change from a position in the institutional bond department to the retail bond department which involved some retraining and a reduction of income was found to be a demotion and constructive dismissal in *Springer* v. *Merrill Lynch Royal Securities Ltd.* (1984) 4 C.C.E.L. 81 (Ont. S.Ct.).

Can an employee sue for wrongful or constructive dismissal if that employee has resigned?

An employee who has submitted a letter of resignation will not be precluded from suing for either wrongful dismissal or constructive dismissal if it is established the employee was pressured or forced to resign, or motivated to do so by a change in employment circumstances.

What constitutes "appropriate notice" or damages in lieu of notice?

The *classic legal statement on appropriate notice is as follows:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant, and the availability of similar employment, having regard to the experience, training and qualifications of the servant.
>
> *Bardal* v. *Globe and Mail* [1960] O.W.N. 253

The term "servant" is an anachronism, as employment law arose from the old law of "master and servant".

Damages for wrongful dismissal are awarded in lieu of notice. The primary factors taken into account by a court in assessing damages are the employee's age, length of service, type of job, and availability of reasonably equivalent alternative employment.

The B.C. Supreme Court has established that a longer notice period is required for both long-term employees and employees of advancing years. Similarly, where the job performed by the wrongfully dismissed employee required highly specialized skills, the courts are inclined to grant higher damage awards on the basis that it is reasonable to assume that prospects for future employment are limited.

Factors which will not be taken into account include an employee's efforts and contribution to the financial success of the undertaking and an employer's economic considerations such as reduced business activities or opportunities.

The notice period will not be reduced on the basis that the employer had "some" or "near" cause to dismiss.

The B.C. Court of Appeal has recently confirmed that 24 months is generally the outside or maximum notice period in wrongful dismissal cases (it has been higher in cases where there is a breach of a fixed term contract of services). The appeal court overturned a B.C. Supreme Court decision to award damages equivalent to 30 months notice.

The damages recoverable by a wrongfully dismissed employee are for the monetary loss which flows naturally from the failure to provide notice.

The pension rights of public service employees are governed by the *Pension (Public Service) Act*, and so any claim for lost pension benefits must be assessed in the context of that *Act*.

Damages for wrongful dismissal have been awarded where a job offer has been made and accepted, then subsequently rescinded before the prospective employee had commenced employment.

[* Note: this statement has recently been challenged by Madame Justice Southin in the B.C.C.A. decision of *Woodlock* v. *Nova Corp.*]

Other kinds of damages

The general rule is that damages in a wrongful dismissal action will be limited to lost earnings during the period of notice and will not include damages for such things as the manner of the dismissal, injured feelings or loss attributed to the fact the dismissal makes it more difficult to obtain other employment. Exceptions to this general rule exist in extraordinary circumstances, giving rise to the possibility of successfully claiming for such things as aggravated or punitive damages, but only in rare cases.

1. **Aggravated damages** describes an award that aims at compensation but takes full account of intangible injuries such as mental distress and humiliation, and is sometimes referred to as damages for mental suffering.
2. **Punitive or exemplary damages** should be distinguished from aggravated damages. Punitive damages are designed to punish the wrongdoer and are an exception to the general common law rule that damages are designed to compensate the injured, not to punish

the wrongdoer. Such damages will only be awarded where the court finds the employer's conduct is deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. For example, in *Robitaille* v. *Vancouver Hockey Club Ltd.* (1981) 124 D.L.R. (3d) 228 (B.C.C.A.) the plaintiff, a professional hockey player, suffered severe injury and damage because he was denied proper medical attention by his employer and was forced to continue playing and practicing until in his weakened condition he suffered serious injury. The plaintiff was awarded punitive damages in addition to compensatory general damages.

What, if any, obligations does a wrongfully dismissed employee have?

A wrongfully dismissed employee is under a continuing obligation to try to find reasonably similar alternative employment. If it can be demonstrated the employee did not "mitigate his damages" by trying to find other work, the court will reduce any damages awarded that employee in a wrongful dismissal action. If, on the other nand, an employee secures alternate employment, the amount earned during the period of reasonable notice will be deducted from the damage award.

The courts do not require that a wrongfully dismissed employee take any form of employment in order to mitigate damages, but rather that the employee try to find similar employment. Further, the courts will generally not require a wrongfully dismissed employee to accept alternate employment with the same employer.

What if the employee is appointed by order-in-council?

Some persons are appointed to the public service by order-in-council and some public service employees are appointed to act in some specific capacity under ministry legislation by order-in-council. Dismissal of a person appointed by order-in-council, or of an employee who is also designated to act in some capacity by order-in-council under an Act, should be undertaken only with legal advice.

New developments

There are some new developments in this area of the law to be aware of.

1. **"Wrongful Hiring"**: the Ontario Supreme Court recently held that verbal promises and representations made by a manager during a hiring interview bind the employer and therefore can form the basis of a damage claim for negligent misrepresentation if the promises or representations do not materialize.

   The employee seeking such damages must demonstrate the promises were intended to be acted upon, and that the employee acted on them to his detriment. It is therefore important not to induce prospective employees by making exaggerated representations or promises that you may not be able to fulfill.

2. **"Wrongful Resignation"**: it may be that where a departing employee fails to provide the employer with reasonable notice of his departure and the employer suffers damages as a result, the employer can sue for wrongful resignation. This kind of action would arise where the employer is unable to find a replacement possessing the employee's special skills.

What is the effect of the Employment Standards Act?

The *Employment Standards Act* sets out the minimum standards for employment of employees, both union and non-union, although in the former case some parts of the *Act* will not apply but are rather dealt with in the applicable collective agreement. The *Act* requires notice or money in lieu of notice in cases where an employee has been dismissed without just cause. The notice period set by s. 42 of the *Act* provides only the minimum standard and does not bar an employee from seeking more extensive relief at common law. A court will not, and a contract cannot, prescribe a notice period at less than that prescribed by employment standards legislation.

Human rights issues in employment

The *Human Rights Act* applies to the Government of British Columbia as an employer. Section 8 of that Act provides that no person or anyone acting on that person's behalf can refuse to employ, refuse to continue to employ, or discriminate against a person with respect to their employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, physical or mental disability, sex or age of that person or because of a conviction or criminal or summary conviction charge unrelated to the employment or intended employment of that person. Discrimination on the basis of sex has been interpreted to include sexual harrassment and discrimination on the basis of pregnancy.

The *Human Rights Act* also expressly provides a defence to discrimination in employment: if the refusal, limitation, specification or preference is based on a *bona fide* occupational requirement, it will be justifiable.

An employee or prospective employee who feels discriminated against may lodge a complaint with the Human Rights Council. If the complaint proceeds to a hearing, the onus will be on the person complaining to establish a *prima facie* case of discrimination. Once a *prima facie* case has been established, the onus shifts to the employer to demonstrate: in cases of direct discrimination, that the discriminatory act is justified as a "*bona fide* occupational requirement"; or, in cases of adverse effect discrimination, the employer has fulfilled its duty to accommodate.

The meaning of both "*bona fide* occupational requirement" and "duty to accommodate" is the subject of numerous cases. If you feel that an otherwise discriminatory term of employment can be justified on this basis, you should contact your ministry solicitor to advise you on this point *before* taking any action.

It is important to note that the *Human Rights Act* is remedial legislation and in part intended to be educational in the sense of informing and explaining what it means to discriminate. The person filing the complaint does not need to establish that there was intention to discriminate. Unintentional and adverse effect discrimination will constitute a violation of the *Human Rights Act*.

Adverse effect discrimination arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the workplace.

It is also important to note that an employer will be liable for the discriminatory acts of its employees. Such liability may be reduced somewhat if the employer, on discovering the discriminatory conduct, takes immediate steps to deal with or rectify the situation. The kinds of steps that should be taken will depend on the nature of the discriminatory conduct.

Once a person succeeds in establishing that the employer has violated s. 8 of the *Human Rights Act*, the Human Rights Council can invoke broad remedial powers. If, for example, an employee dismissed for discriminatory reasons wishes to be reinstated, the Council has the authority under the statute to order reinstatement. This is an exception to the general principle that non-union employees have no right to reinstatement.

If an employee is awarded damages, the damage award may not be calculated on the basis of the common law principles of wrongful dismissal. This means that an employer's potential liability for the dismissal of an employee for discriminatory reasons *may* be greater than for pure "wrongful" dismissal.